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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JAMES M. CANINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant seeking a new trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976), on the ground that the prosecution has withheld exculpatory evidence, must show that he exercised due diligence prior to trial to obtain the omitted evidence. The United States Court of Appeals for the Third Circuit in this case, and the Courts of Appeals for the Seventh and Ninth Circuits in other cases, have held that due diligence is required, putting them squarely in conflict with the holding of the United States Court of Appeals for the District of Columbia Circuit and the reasoning of *United States* v. *Agurs*.

2. Whether the District Court and the Court of Appeals correctly applied *Brady* v. *Maryland*, *supra*, and *United States* v. *Agurs*, *supra*, when they held that exculpatory evidence in the possession of the prosecution before trial need not be given a defendant so long as, in the District Court's view, it would have been tactically unwise for the defendant to have used the evidence at trial.

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Petitioner James M. Canino prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit which affirmed the judgment of conviction of petitioner James M. Canino entered upon a jury verdict of guilty and which, in a separate appeal, affirmed the judgment of the United States District Court for the District of New Jersey denying a new trial.

OPINIONS BELOW

The Court of Appeals issued no opinions. The oral opinion denying a new trial delivered from the bench by the United States District Court for the District of New Jersey is reprinted in the Appendix to this Petition. A. 5a.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment April 14, 1982, in two consoli-

dated appeals, affirming petitioner James M. Canino's conviction for conspiracy and substantive offenses, *United States* v. *Canino*, No. 81-2718, and affirming the judgment denying his motion for a new trial, *United States* v. *Canino*, No. 82-5142. Copies of these orders affirming the judgments of the United States District Court for the District of New Jersey are printed in the Appendix to this Petition. A. 2a; 3a. A timely petition for rehearing in the consolidated appeals was denied May 24, 1982. A copy of the Order of the United States Court of Appeals for the Third Circuit denying the petition for rehearing is also printed in the Appendix to this Petition. A. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part as follows:

> "No person shall be . . . deprived of life [or] liberty . . . without due process of law."

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner James M. Canino was indicted October 31, 1980,[1] by a federal grand jury in Newark, New Jersey. The indictment charged Canino with one count of conspiracy, 18 U.S.C. § 371, eleven counts of mail fraud, 18 U.S.C. § 1341, seven counts of wire fraud, 18 U.S.C. § 1343, and two counts under the racketeering acts, 18 U.S.C. §§ 1962, 1963. The indictment alleged that Canino and his business associate, Alvin Raphael,[2] obtained kickbacks in connection with construction and operation of a

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[1] This indictment superseded an original indictment handed up March 19, 1980.

[2] Raphael, charged in each count along with Canino, died before trial.

housing project financed by the New Jersey Housing Finance Authority (hereinafter "N.J.H.F.A."), an agency of the State of New Jersey. Specifically, the indictment charged that Canino and Raphael required subcontractors who wished to obtain work on the housing project to inflate their contract prices and then to pay the inflated increment as a consulting fee to a company known as Regional Funding and Development Corporation (hereinafter "Regional Funding"), which in turn was owned by Canino and Raphael.

The case was tried to a jury in the United States District Court for the District of New Jersey in April 1981, the Honorable H. Curtis Meanor, J., presiding. At trial, the prosecution attempted to show that Canino had concealed the existence of Regional Funding from N.J.H.F.A. officials in the fear that any investigation of Regional Funding by state auditors would reveal the alleged kickbacks. The District Court refused to allow this evidence in to show that the concealment *per se* was fraudulent, but allowed the evidence in to show consciousness of guilt on the part of Canino. The prosecutors emphasized the point, and the District Court charged the jury that it could consider evidence of concealment as evidence of Canino's intent to defraud. A. 6a-9a.

During trial, the District Court dismissed one count against Canino and entered a verdict of acquittal on another. The jury acquitted Canino of two additional counts. It convicted him on the other charges. Notice of appeal was timely filed July 27, 1981.

After petitioner filed his initial brief in the United States Court of Appeals for the Third Circuit, he learned that the prosecutors, who at trial argued strenuously that he had concealed Regional Funding from state auditors, had in their possession worksheets of an auditor for N.J.H.F.A. which showed that, during a 1976 audit of the housing project at issue, the auditor had uncovered transactions between Regional Funding and A.J.

Tenwood Associates, Inc., indicating that the two companies were related. Moreover, the auditor's worksheets indicated that the auditor had treated Regional Funding as a company related to A.J. Tenwood and to Canino.

On the basis of this new evidence, petitioner on January 13, 1982, moved for a new trial on the ground that the information should have been disclosed pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). The District Court denied this motion, finding that (1) the evidence was not "newly discovered" because Canino did not exercise due diligence to discover it before trial, and (2) the evidence was not "material" because even had the petitioner been aware of the evidence, it would have been tactically unwise for him to have used it. A. 9a-12a.

Petitioner then filed timely notice of appeal from the District Court's denial of his motion. The two appeals were consolidated for argument and disposition in the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed both judgments without opinion April 14, 1982. A. 2a; 3a. On May 24, 1982, the Court of Appeals denied petitioner's petition for rehearing, filed in both appeals. A. 1a.

B. Statement of Facts

This case revolves around the financing and construction of a high-rise apartment project in West New York, New Jersey, known as Parkview Towers. For purposes of this project, Excel Corporation—owned by Canino and Raphael—in 1972 became a general partner in a newly-formed entity, Parkview Towers Company. (The limited partners were private investors.) Then in 1974 Parkview Towers Co. entered into an agreement with N.J.H.F.A. for the purpose of financing and constructing Parkview Towers, under which N.J.H.F.A. provided 90% of the agreed construction cost of approximately $20,000,000.00, and Parkview Towers Co. 10%, and under

which Parkview Towers Co. undertook to construct and manage the project.

With the approval of N.J.H.F.A., Parkview Towers Co. in April 1974 entered into a cost-plus-fee construction contract with a company known as A.J. Tenwood Associates ("Tenwood"). Tenwood was also a subsidiary of Excel. Tenwood was to act as general contractor, with responsibilities for hiring all subcontractors and managing construction of the project.

During this time, Canino had been seeking subcontractors who could bring the job in under the $20,000,000.00 mortgage ceiling. In looking for cost-efficient subcontractors, Canino became convinced of the need to form an entity that could provide start-up and bridge loans to subcontractors that otherwise, without such financing assistance, would not be able to do the work within the overall mortgage ceiling. After consulting counsel in both New York and New Jersey, both of whom stated it would be permissible to form a company to provide such financing assistance and to operate it as a sub-subcontractor on the project, he and Raphael formed Regional Funding in March 1974.

In 1979, a grand jury began investigating charges that Canino and Raphael used Regional Funding to obtain kickbacks from subcontractors working on Parkview Towers. In 1980, Canino and Raphael were indicted on 21 counts. Insofar as Regional Funding was concerned, the indictment focused principally on allegations that Canino and Raphael induced subcontractors as a condition of obtaining business to inflate their bids, and then required them to sign sham consulting contracts with Regional Funding by which the inflated amount would be paid Regional Funding. The indictment charged that

the subcontractors received no consulting services or financing assistance in return.[3]

Prior to trial, Canino made a general request of the prosecutors for exculpatory information as defined by *Brady* v. *Maryland*, 373 U.S. 83 (1963). A. 10a. The prosecution made no specific response to this request. The prosecution did, however, make available some 60,000 documents that the prosecutors had marked as exhibits for use at trial. A. 16a. Canino's access to this mass of undifferentiated documents was restricted before trial, and none of the documents specifically was designated as "*Brady* material." A. 15a-17a.

At the trial, the prosecution rested its case as to intent to defraud on proof that Canino had made strenuous efforts to conceal the existence of Regional Funding from N.J.H.F.A. In his opening argument, the prosecutor argued that intent to defraud would be proved by the fact Canino concealed Regional Funding from the State agency. The prosecution then attempted to support this contention by the testimony of several witnesses. Howard Kalb, Canino's accountant, testified that Canino had told him not to reveal the existence of Regional Funding as a party related to Excel and Tenwood. Another accountant said he had never learned of the fees paid by subcontractors to Regional Funding, even though he had told Canino that accepted accounting standards required disclosure in the audit of such related companies. In addition, the prosecutors put on the testimony of an employee of N.J.H.F.A. who said that Regional Funding's existence had not been disclosed on cost certifications submitted to N.J.H.F.A. by the general contractor, Parkview Towers Company.

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[3] The indictment also alleged that Canino took kickbacks on insurance contracts related to the project, and had Tenwood and subcontractors perform work on his home that was paid for by funds from the project.

The prosecutors originally sought to prove that Canino's failure to disclose the existence of Regional Funding was fraudulent in and of itself. The District Court rejected this approach, but did allow the prosecutors to put the foregoing evidence in to show intent to defraud. Accordingly, in closing argument the prosecutor hammered away at this concealment as the nail that held his fraud case together. Four times in his closing argument to the jury the prosecutor argued that the intent to defraud necessary to convict was proved by Canino's failure to disclose Regional Funding's existence to N.J.H.F.A. For example, the prosecutor argued that:

> "Anyone who looks at Regional Funding sees that it's a sham, and that's why they had to hide it. That's why they couldn't let the H.F.A. find out, because if you look at Regional Funding you see it's a sham, it's a kickback arrangement that won't stand the light of day." Trial Transcript, Vol. 16, at 2913.

And he again argued:

> "The point about him not disclosing Regional Funding to the H.F.A. is it shows that they knew they were dealing with kickbacks. They knew they were dealing with something improper because if you have got nothing to hide, why not disclose it." *Id.*, at 2914.

Most important, the District Court specifically instructed the jury that it could find intent from the evidence that Canino had concealed Regional Funding from N.J.H.F.A.:

> "You may, you're not required to, but you may consider the evidence of the concealment of Regional Funding as being relevant to defendant's intent to defraud." Trial Transcript, Jury Charge, at 49-50.
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> "The failure to disclose Regional Funding's existence itself is not a fraud, although you may consider such failure to disclose as evidence of defendant's probable objectives, intent or state of mind." *Id.*, at 51.

Upon the theory that intent under the mail and wire fraud statutes was made out by proof of concealment, then, the case went to the jury. Canino was convicted by the jury of mail and wire fraud, 18 U.S.C. §§ 1341, 1343, racketeering, 18 U.S.C. § 1962, the predicate crimes for which were the mail and wire fraud counts, and conspiracy to commit mail and wire fraud, 18 U.S.C. § 371.

Canino filed timely notice of appeal and urged reversal in the United States Court of Appeals on the ground, among others, that the evidence as to concealment of Regional Funding improperly was admitted.

After Canino submitted his brief on appeal, but before argument and submission, counsel representing Canino in civil ligitation against the United States discovered documents in the possession of the United States Attorney which showed that N.J.H.F.A. had in fact been aware as early as 1976 that Regional Funding existed and that it was related to Parkview Towers Co., Excel, and to Raphael and Canino. Specifically, Canino found worksheets prepared by an auditor employed by N.J.H.F.A. when the auditor did a preliminary review of the construction costs of the Parkview Towers project. As part of that review, the auditor, John Hutcheson, examined the books of Tenwood, where he found transactions recorded between Tenwood and Excel, Canino, and Raphael. He also found a transaction involving an interest-free loan from Tenwood to Regional Funding. After examining these transactions, Hutcheson prepared worksheets that treated Tenwood as related to Excel, Parkview Towers Co., Canino, Raphael, *and Regional Funding*. A. 8a-9a; 13a-25a.

At the same time, Canino discovered that the worksheets had been in the possession of the prosecution prior to trial. Indeed, Canino learned that the documents were

among the documents listed as exhibits by the prosecution prior to Canino's trial.[4]

Canino then moved in the District Court for a new trial on the ground the newly discovered worksheets should have been made available to him before trial under *Brady* v. *Maryland*. The District Court rejected Canino's *Brady* motion on two grounds. First, the court held the worksheets were not newly discovered in that "the failure to bring [them] forth" before trial "was due to a lack of diligence on the part of the defense in the preparation of this case." A. 9a. And second, the District Court held that the worksheets were not material to the defense because, had they been put in evidence, the jury would have interpreted them as a motive for concealment of Regional Funding from N.J.H.F.A. The District Court reasoned that had Canino known the worksheets were in N.J.H.F.A.'s possession, he would have had all the more reason to conceal the presence of Regional Funding from N.J.H.F.A. because any mention of Regional Funding would have, in the District Court's view, caused N.J.H.F.A. to check those previous worksheets. The Court said:

> "Even if it had been brought forth by the defense to support the thesis that we didn't try to hide Regional Funding from the N.J.H.F.A., it seems to me it would have been neutralized, if not entirely overcome to the detriment of the defense by the argument that I have just made, i.e., since the defense had an idea that the N.J.H.F.A. knew about Regional Funding and A.J. Tenwood and their relationship, that was all the more reason why . . . Canino and Raphael took great pains to prevent the

[4] As noted, these documents ran to tens of thousands of pages. They were made available to Canino in an undifferentiated mass. The prosecutors never identified any of the documents as exculpatory within the meaning of *Brady* v. *Maryland*. Canino and his lawyer had been given only restricted access to these documents before trial. A. 15a-17a.

N.J.H.F.A. from finding out about Regional Funding and its presence on this job.

"This evidence either would have had no effect whatsoever on this trial had it been adduced, or, as I think is most likely, would have had a decided detrimental effect on the defendant in this case." A. 12a.

Canino timely filed notice of appeal, and this second appeal was consolidated with the direct appeal. The Court of Appeals affirmed both judgments April 14, 1982. It denied Canino's consolidated petition for rehearing in both cases May 24, 1982.[5]

REASONS WHY THE WRIT SHOULD BE GRANTED

In affirming the judgments of the District Court, the Court of Appeals erred in requiring that Canino establish that he used due diligence to discover the evidence before trial. The reasoning of *United States* v. *Agurs*, 427 U.S. 97 (1976), and the square holding of *Marshall* v. *United States*, 436 F.2d 155 (CADC 1970), are that no such due diligence is required when a motion for a new trial is based on *Brady* v. *Maryland*, 373 U.S. 83 (1963). The judgment of the Third Circuit in this case thus presents a conflict with decisions of this Court and another Court of Appeals.

In addition, the decision of the Court of Appeals conflicts with the holding of this Court in *United States* v. *Agurs*, that a new trial must be granted whenever the prosecution fails to turn over information in its files that "creates a reasonable doubt that did not otherwise exist." *Id.*, at 112. Neither the District Court nor the Court of Appeals applied that standard here. To the contrary, they held that because the omitted evidence, in the District Court's view, would not have been used by the petitioner at trial as a matter of tactics, a new trial

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[5] This petition seeks a writ of certiorari to review the judgments in both appeals. Sup. Ct. Rule 19.4.

was not required. This is in conflict with this Court's decision in *Agurs*.

1. The Courts of Appeals Are In Conflict as to Whether Due Diligence Need Be Shown

There is no question here as to whether Canino was aware of the Hutcheson worksheets during trial. He was not. The District Court nevertheless held that those worksheets were not "newly discovered" evidence within the meaning of Fed. Rule Crim. Pro. 33, because the worksheets were among the many documents—running to tens of thousands of pages—made available to Canino by the prosecutors before trial. The District Court held:

> "[U]nder the circumstances this evidence is by no means newly discovered [because] the failure to bring it forth . . . was due to a lack of diligence on the part of the defense in the preparation of this case." A. 9a.

The ruling of the District Court—affirmed by the Court of Appeals—thus adopted in the context of a motion based upon *Brady* v. *Maryland* the traditional requirement under Fed. Rule Crim. Pro. 33 that "a new trial on the ground of newly discovered evidence will be denied if the defense did not show due diligence to learn of the evidence." 2 C. Wright, Federal Practice & Procedure § 557, at 520 (1969). See, *e.g.*, *Reno* v. *United States*, 340 F.2d 307 (CA 5 1965); *United States* v. *Capece*, 287 F.2d 537 (CA 2), *cert. denied*, 368 U.S. 847 (1961). In so ruling, the Third Circuit aligned itself with a number of other Courts of Appeals that have held that due diligence must be shown in a motion made under *Brady* and *Agurs*. See, *e.g.*, *United States* v. *Shelton*, 588 F.2d 1242, 1250 (CA 9 1978), *cert. denied*, 442 U.S. 909 (1979); *United States* v. *Hedgeman*, 564 F.2d 763, 768 (CA 7 1977), *cert. denied*, 434 U.S. 1070 (1978); *cf. United States* v. *Mackey*, 571 F.2d 376, 389 n.15 (CA 7 1978).

But in so ruling, the Third Circuit here—like the Seventh Circuit in *Hedgeman*, *supra*, and the Ninth Circuit in *Shelton*, *supra*—is in direct conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Marshall* v. *United States*, 436 F.2d 155 (CADC 1970). In that case, the trial court had held that the defendant was not entitled to a new trial on the basis of newly discovered evidence that a lineup had been conducted in violation of the defendant's Due Process rights, because the defendant had not demonstrated that he had made diligent efforts to secure that evidence at trial. The Court of Appeals rejected this due diligence demand. Because the defendant could have raised his challenge to the lineup collaterally after conviction, the Court held, "his counsel's lack of diligence at time of trial should be no barrier to considering a motion for a new trial on the merits of the constitutional issue raised." *Id.*, at 159. The Court of Appeals concluded:

> "Thus we are of the view that the 'due diligence' standard which ordinarily governs disposition of motions for a new trial based on alleged newly discovered evidence should not apply when the new evidence raises issues which challenge the constitutional validity of the conviction." *Id.*, at 159 n.11 (citation omitted).

Under *Marshall*, due diligence as used in Rule 33 cases would not be a consideration in evaluating a claim under *Brady* and *Agurs*, for a *Brady* claim is one that "challenge[s] the constitutional validity of the conviction," *Marshall*, *supra*, 436 F.2d, at 159 n.11, by alleging that the failure to provide the *Brady* evidence deprived the defendant of due process of law under the Fifth Amendment. Because Canino's motion for a new trial thus raised a constitutional challenge to his conviction, under *Marshall* Canino would not have been required to establish "due diligence" to make out his claim for a new trial. The decision of the District Court and the Third

Circuit, however, imposed on Canino just such a due diligence obligation.

Indeed, the requirement of due diligence in this case is not only in direct conflict with the decision of the D.C. Circuit in *Marshall*, it is inconsistent with the reasoning of this Court's decision in *Agurs*. Prior to *Agurs*, defendants seeking a new trial under *Brady* generally were required to establish "five essential requisites for [obtaining] a new trial on the basis of 'newly discovered' evidence." *United States* v. *Meyers*, 484 F.2d 113, 116 (CA 3 1973), *cited in Agurs*, *supra*, 427 U.S., at 111 n.19. Specifically, the defendant had to prove that the evidence (1) came to his knowledge after trial; (2) could not have been discovered sooner had he exercised due diligence; (3) is not cumulative or impeaching; (4) is material to the issues involved; and (5) would probably lead to acquittal in a new trial. See, *e.g.*, *United States* v. *Myers*, *supra*, 484 F.2d, at 116; 2 C. Wright, Federal Practice & Procedure § 557 (1969).

In non-*Brady* situations, these requirements "to establish that a new trial is warranted on the basis of new evidence under Rule 33" remain the law today. *United States* v. *Hedman*, 655 F.2d 813, 814 (CA 7 1981). See, *e.g.*, 2 C. Wright, Federal Practice & Procedure § 557 (1969). Where the motion is made under *Brady*, however, not all these five requirements apply. *Agurs* held that "the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Agurs*, *supra*, 427 U.S., at 111. *Agurs* thus changed the traditional test for determining when a new trial is to be granted by allowing a new trial if the evidence "creates a reasonable doubt that did not otherwise exist." *Id.*, at 112. The Court departed from the traditional test precisely because of the special Due Process concerns raised by a *Brady* motion for a new trial that are not present in other new trial situations, thus echoing

the concern in *Marshall* that the presentation of constitutional claims not be restricted on motions for a new trial by a rigid adherence to previous standards under Rule 33.

In the same way, the special constitutional concerns of *Agurs* require that due diligence need not be shown when a new trial is sought under *Brady*. Where material, exculpatory evidence in the possession of the prosecutor is not revealed, a new trial should be granted whether or not the defendant by due diligence could have discovered the evidence before trial. As this Court held in *Agurs*, "if the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Id.*, at 111. See, *e.g.*, *United States* v. *Shelton*, *supra*, 588 F.2d, at 1250 & n.14.

The decisions in this case, however, and of the Ninth Circuit in *Shelton* and the Seventh Circuit in *Hedgeman*, all reject the *Marshall* position and the reasoning of *Agurs*, and retain the traditional Rule 33 due diligence requirement in the context of a *Brady* motion. This Court should issue a writ of certiorari to resolve this conflict.

2. The Omitted Evidence Creates A Reasonable Doubt

In this case, the prosecutors possessed—but failed specifically to disclose to Canino—information that N.J.H.F.A. was in fact aware of the existence of Regional Funding, and of Regional Funding's relationship to Canino and Canino's other companies. In the circumstances of this case, this evidence would have created a reasonable doubt had it been presented to the jury. The Fifth Amendment accordingly requires a new trial.

Canino made only a general request for exculpatory information as defined by *Brady* v. *Maryland*, *supra*.

The failure of the prosecutor to provide the Hutcheson worksheets in response to this request therefore amounts to a violation of Canino's Fifth Amendment rights under the Due Process Clause if that evidence would have "create[d] a reasonable doubt that did not otherwise exist." *United States* v. *Agurs*, 427 U.S., at 112. This formulation of the test under the Due Process Clause has uniformly been followed by the federal courts applying *Agurs*. *See, e.g., United States* v. *Gardner*, 611 F.2d 770, 774 (CA 9 1980); *Ruiz* v. *Cady*, 635 F.2d 584, 586-587 (CA 7 1980); *United States* v. *Delk*, 586 F.2d 513, 518 (CA 5 1978).

Analysis of the Hutcheson worksheets in light of the whole record in this case demonstrates that the *Agurs* test is met here. The prosecutors' theory was that Canino used Regional Funding as a vessel through which to obtain kickbacks from subcontractors. They rested their case as to intent to defraud upon evidence that Canino attempted to conceal the existence of Regional Funding from N.J.H.F.A. The prosecutors called the accountants and through them put in extensive evidence that Canino took pains to conceal Regional Funding. They then called an employee of N.J.H.F.A. who testified that Regional Funding was not listed in papers filed with that agency as related to Canino or any of Canino's companies. In closing argument, the prosecutors repeatedly emphasized that this concealment was proof of intent. And they obtained from the District Court instructions to the jury that intent to use Regional Funding to defraud N.J.H.F.A. could be inferred from evidence of concealment.

In these circumstances, introduction into evidence of the Hutcheson worksheets would have created a reasonable doubt. Those worksheets show that as early as the spring of 1976 an N.J.H.F.A. auditor was aware of Regional Funding. They show that the auditor was aware of the relationship between Tenwood—a Canino

company—and Regional Funding, as evidenced by the $30,000.00 interest-free loan from Tenwood to Regional Funding discovered by the auditor. And they show an awareness that the auditor—and thus, N.J.H.F.A.—realized that Canino, Raphael, Excel, Tenwood, and Parkview Towers Company were all related to Regional Funding.

The Hutcheson worksheets thus negated the principal evidence of intent relied upon by the prosecutors below, that is, the supposed concealment of Regional Funding from N.J.H.F.A. These worksheets showed that far from being hidden, Regional Funding was known to N.J.H.F.A. They show that Canino, by opening Tenwood's books to Hutcheson, himself provided access to information revealing the existence of Regional Funding, and to information showing Regional Funding to be related to Canino, Raphael, and the companies they controlled.

On this record, then, the test of *Agurs* was met: the Hutcheson worksheets create a reasonable doubt as to guilt, by negating the intent drawn from evidence of concealment, that was not otherwise in the evidence.[8] Had the District Court or the Court of Appeals applied the proper test, then, it would have reversed the conviction and granted Canino a new trial.

But the courts below did not follow *Agurs*. They did not analyze the newly discovered evidence in light of the record to determine whether a reasonable doubt was

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[8] This is especially true in light of *Agurs*' modification of the test for determining when a new trial is to be granted under Rule 33. As discussed above, before *Agurs* motions for a new trial under Fed. Rule Crim. Pro. 33, even when based on *Brady*, had to show that the newly discovered evidence probably would have resulted in acquittal. After *Agurs*, however, the test is "not so severe as to require the defendant who discovers the undisclosed evidence after trial to demonstrate that it 'probably would have resulted in acquittal.'" *United States* v. *Imbruglia*, 617 F.2d 1, 5 n.9 (CA 1 1980), *quoting United States* v. *Agurs*, *supra*, 427 U.S., at 111. It is enough that the evidence creates a reasonable doubt.

created. To the contrary, they analyzed the Hutcheson workpapers from a tactical standpoint only. The trial court speculated that, had Canino known of the existence of the worksheets, he would have worked all the harder to conceal Regional Funding from N.J.H.F.A. The Court theorized that Canino at trial therefore would have avoided introducing the Hutcheson worksheets—even had he possessed them—because those worksheets would have given him but one more motive to have concealed Regional Funding from N.J.H.F.A. As the District Court stated: "Frankly, as a defense counsel in this case, had I known of it, I would have stayed away from it like I would have stayed away from a rattlesnake or a cobra." A. 11a.

This is a perversion of the *Agurs* test. The Fifth Amendment to the Constitution, as interpreted by *Agurs*, requires that a new trial be ordered when the evidence withheld creates a reasonable doubt as to guilt. Nothing in *Agurs*, nothing in *Brady*, nothing in the Fifth Amendment, remotely indicates that the grant of a new trial turns upon the trial court's opinion as to whether a wise defense lawyer would have used the evidence or not. *See, e.g., United States* v. *Provenzano*, 615 F.2d 37, 50-51 (CA 2), *cert. denied*, 446 U.S. 953 (1980).

The judgments of the Court of Appeals affirming the District Court thus departed substantially from the test set forth in *Agurs*. This Court should issue a writ of certiorari to correct that misinterpretation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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